

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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THE 24-7 GROUP OF COMPANIES, INC.,
a Nevada corporation,

Plaintiff,

v.

TERRY ROBERTS, et al.,

Defendants.

Case No. 3:13-cv-00211-MMD-WGC

ORDER

(Def's Motion to Dismiss Fourth Claim for
Relief – dkt. no. 10)

I. SUMMARY

Before the Court is Defendant Wells Fargo Bank, N.A.'s ("Wells Fargo") Motion to Dismiss Fourth Claim for Relief Against Wells Fargo Bank, N.A. ("Motion") (dkt. no. 10). The Motion is granted in part and denied in part.

II. BACKGROUND

Plaintiff The 24-7 Group of Companies, Inc., filed a First Amended Complaint ("Complaint") in the Second Judicial District Court of the State of Nevada in and for the County of Washoe, and Wells Fargo removed the action to this Court on the basis of diversity jurisdiction. (Dkt. no. 1.)

The Complaint alleges the following. Plaintiff operates an auto parts distribution business and hired Defendant Terry Roberts as an independent contractor. Mr. Roberts' wife Melanie Roberts, who was never employed by Plaintiff, delivered a request for credit on behalf of Plaintiff to Williams Scotsman, a California company. Mrs. Roberts falsely identified herself as Plaintiff's bookkeeper in the request for credit, which she signed. Mr.

1 Roberts executed a lease agreement with Williams Scotsman for the rental of a mobile
2 office and named Plaintiff as the lessee. Mr. Roberts signed the lease agreement as
3 "Director Authorized Representative." Mr. Roberts was not authorized to execute this
4 lease agreement on behalf of Plaintiff.

5 Mr. and Mrs. Roberts ("Individual Defendants") opened a bank account in
6 Plaintiff's name at Wells Fargo. They "conducted business in the name of [Plaintiff] from
7 this account, paying Williams Scotsman, and possibly others, from this account." (Dkt.
8 no. 1, Ex. A at 3 ¶18.) Wells Fargo's policies require several documents to be provided
9 in order for an individual to open a business bank account for a corporation, including
10 Articles of Incorporation and a Corporate Resolution. (Dkt. no. 1, Ex. A at 3 ¶19; dkt. no.
11 11, Ex. 1.) The Articles of Incorporation provided by Individual Defendants to Wells
12 Fargo in their account application do not list their names or grant them authority to open
13 an account on behalf of Plaintiff, and no Corporate Resolution was provided or verified.
14 (Dkt. no. 1, Ex. A at 3–4 ¶21; dkt. no. 11, Exs. 2, 3.) Plaintiff did not authorize Individual
15 Defendants to "open bank accounts, sign checks, deposit funds, or in any other manner
16 conduct financial transactions" on Plaintiff's behalf. (Dkt. no. 1, Ex. A at 4 ¶22.)

17 The Complaint alleges claims for intentional interference with prospective
18 economic advantage, constructive fraud and constructive trust against the Individual
19 Defendants. The Complaint's Fourth Claim for Relief asserts negligence and violation of
20 NRS 104.3405 against Wells Fargo. Wells Fargo now moves to dismiss the Fourth Claim
21 for Relief under Fed. R. Civ. P. 12(b)(6). The Individual Defendants filed a joinder to the
22 Motion. (Dkt. no. 16.) Plaintiff opposed the Motion (dkt. no. 11) and Wells Fargo replied
23 (dkt. no. 14.)

24 **III. DISCUSSION**

25 The Complaint's Fourth Claim for Relief contains two claims: (1) violation of NRS
26 104.3405, which is Nevada's version of the Uniform Commercial Code ("UCC") section

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1 3-405; and (2) common law negligence.¹ Wells Fargo moves to dismiss the former claim
 2 on grounds that the Complaint does not sufficiently allege a violation of NRS 104.3405,
 3 and the latter claim on grounds that it is barred by the economic loss doctrine. The Court
 4 agrees that Plaintiff has failed to state a claim under NRS 104.3405 but finds that
 5 Plaintiff's claim for common law negligence is not barred by the economic loss doctrine.

6 **A. Legal Standard**

7 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
 8 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide
 9 "a short and plain statement of the claim showing that the pleader is entitled to relief."
 10 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While
 11 Rule 8 does not require detailed factual allegations, it demands more than "labels and
 12 conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v.*
 13 *Iqbal*, 556 US 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).
 14 "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550
 15 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient
 16 factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at
 17 678 (internal citation omitted).

18 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
 19 apply when considering motions to dismiss. First, a district court must accept as true all
 20 well-pled factual allegations in the complaint; however, legal conclusions are not entitled
 21 to the assumption of truth. *Iqbal*, 556 U.S. at 679. Mere recitals of the elements of a
 22 cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678.
 23 Second, a district court must consider whether the factual allegations in the complaint
 24 allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the

25 ¹The Fourth Claim for Relief is subtitled "Breach of Duty/Negligence/Violation of
 26 NRS 104.345 and UCC 3-405 – Wells Fargo." (Dkt. no. 1, Ex. A at 6.) The Motion treats
 27 this as two claims, combining "Breach of Duty/Negligence" into a common law
 28 negligence claim, and treating "Violation of NRS 104.345 and UCC 3-405" as one claim
 for violation of NRS 104.3405, which is adapted from the UCC provision. Plaintiff does
 not object to this categorization.

1 plaintiff's complaint alleges facts that allow a court to draw a reasonable inference that
2 the defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does
3 not permit the court to infer more than the mere possibility of misconduct, the complaint
4 has "alleged—but not shown—that the pleader is entitled to relief." *Id.* at 679 (internal
5 quotation marks omitted). When the claims in a complaint have not crossed the line from
6 conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

7 A complaint must contain either direct or inferential allegations concerning "all the
8 material elements necessary to sustain recovery under some viable legal theory."
9 *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,
10 1106 (7th Cir. 1989) (emphasis in original)).

11 B. Analysis

12 1. NRS 104.3405

13 NRS 104.3405 addresses the responsibilities for "fraudulent endorsement by an
14 employee." There is little case law in Nevada interpreting the statute but under the
15 statute's plain language, a party that, "in good faith, pays an instrument or takes it for
16 value or for collection" can be held liable for the monetary loss suffered if: (1) "an
17 employer entrusted an employee with responsibility with respect to the instrument;" (2)
18 "the employee or a person acting in concert with the employee makes a fraudulent
19 endorsement of the instrument;" (3) "the person paying the instrument or taking it for
20 value or for collection fails to exercise ordinary care in paying or taking the instrument;"
21 and (4) "that failure substantially contributes to loss resulting from the fraud." NRS
22 104.3405(2). The Complaint fails to allege facts that support each of the required
23 elements.

24 As to the first element, "[r]esponsibility with respect to the instrument" is defined
25 as the authority:

- 26 (1) To sign or endorse instruments on behalf of the employer;
27 (2) To act upon instruments received by the employer for bookkeeping purposes,
28 for deposit to an account, or for other disposition;
(3) To prepare or act upon instruments for issue in the name of the employer;

- (4) To supply information determining the names or addresses of payees of instruments to be issued in the name of the employer;
- (5) To control the disposition of instruments to be issued in the name of the employer; or
- (6) To act otherwise with respect to instruments in a responsible capacity.

NRS 104.3405(c). “‘Responsibility’ does not include authority that merely allows an employee to have access to instruments or blank or incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail, or similar access.” *Id.*

The Complaint does not allege that either of the Individual Defendants was entrusted with the required responsibility. Mrs. Roberts was never employed by Plaintiff. (Dkt. no. 1, Ex. A at 2 ¶9.) Mr. Roberts was hired as an independent contractor but the Complaint’s only allegations as to Mr. Robert’s responsibilities are that he was hired “to perform specific limited duties for the company” (*id.* at 2 ¶8), that he was not authorized to execute the lease agreement with Williams Scotsman (*id.* at 3 ¶16), and that he, and Mrs. Roberts, were not authorized to “open bank accounts, sign checks, deposit funds, or in any other manner conduct financial transactions” on Plaintiff’s behalf (*id.* at 4 ¶22). Examining the Complaint’s allegations in the light most favorable to Plaintiff, the Court cannot conclude that either Mr. Roberts or Mrs. Roberts had “responsibility” as it is defined in NRS 104.3405(c).

Plaintiff argues in its Opposition that Comment 4 to NRS 104.3405 “deals with the exact misconduct Wells Fargo has displayed here” but that fact, even if true, is not relevant to the Complaint’s deficiencies. Comment 4 deals with the hypothetical titled “Case #5” in Comment 3. See NRS 104.3405, cmt. 3. In that hypothetical, “Employee is an accounts payable clerk whose duties include entering information into the computer” that “controls Employer’s check-writing machine.” *Id.* Employee’s scheme is to take a check made out by Employer to a well-known national corporation, open a bank account in the name of said corporation, deposit the check in the account and, when the funds clear, wire the money to Employee’s own private account overseas. See NRS 104.3405, cmt. 4. The critical distinction between this hypothetical scenario and the case before the

1 Court is that Employee had "responsibility" under NRS 104.3405(c) as an accounts
 2 payable clerk with access to Employer's check-writing machine. The Court cannot draw
 3 a reasonable inference that either of the Individual Defendants had similar
 4 responsibilities.²

5 As The Complaint fails to allege the material element of "responsibility," the Court
 6 need not continue its analysis of the remaining elements. Plaintiff's NRS 104.3405 claim
 7 will be dismissed.³

8 2. Common Law Negligence

9 Wells Fargo argues that Plaintiff may not recover economic losses under its claim
 10 for negligence. The Motion asserts that "[u]nder Nevada law, economic losses are not
 11 recoverable in negligence absent personal injury or damage to property other than the
 12 defective entity itself." (Dkt. no. 10 at 6 (*citing Calloway v. City of Reno*, 993 P.2d 1259,
 13 1263 (Nev. 2000).) Plaintiff counters that it merely seeks compensation for its damaged
 14 property. Specifically, the money Plaintiff lost from the "checks drawn and processed by
 15 Wells Fargo through the unauthorized fraudulent accounts." (Dkt. no. 13.) The Court
 16 finds that Plaintiff may bring a common law negligence claim against Wells Fargo for
 17 monetary damages in the amount taken from Plaintiff as a result of Wells Fargo's alleged
 18 negligence.

19 "The economic loss doctrine is a judicially created rule that primarily emanates
 20 from products liability jurisprudence." *Terracon Consultants W., Inc. v. Mandalay Resort*
 21 *Grp*, 206 P.3d 81, 85–86 (Nev. 2009) (*citing Calloway*, 993 P.2d at 1263 (overruled on

22 ²Plaintiff's Opposition states that "in his capacity as in independent contractor with
 23 [Plaintiff], it appears Mr. Roberts would obtain checks made payable to Plaintiff from
 24 various customers. He opened the unauthorized Wells Fargo accounts and deposited
 25 various checks into the accounts and this was accomplished without Plaintiff's
 26 knowledge, consent or ratification." (Dkt. no. 11 at 8.) While these facts may suggest that
 Mr. Roberts could have had "responsibility" as that term is defined in NRS 104.3405(c),
 they are absent from the Complaint. The Court will therefore not consider them as part of
 its analysis as Plaintiff may not cure defects in the Complaint through its Opposition.

27 ³Wells Fargo argues that Plaintiff's NRS 104.3405 claim displaces Plaintiff's
 28 common law negligence claim. (Dkt. no. 10 at 5.) Because Plaintiff's NRS 104.3405
 claim is being dismissed, the Court need not address this argument.

1 other grounds by *Olson v. Richard*, 120 Nev. 240, 89 P.3d 31 (Nev.2004) (en banc)).
2 The Nevada Supreme Court explained that “[t]he economic loss doctrine marks the
3 fundamental boundary between contract law, which is designed to enforce the
4 expectancy interests of the parties, and tort law, which imposes a duty of reasonable
5 care and thereby [generally] encourages citizens to avoid causing physical harm to
6 others.” *Terracon*, 206 P.3d at 86 (quotation and citations omitted). The general rule is
7 that the doctrine “bars unintentional tort actions when the plaintiff seeks to recover
8 ‘purely economic losses.’” *Id.* The reason for the doctrine is “to shield a defendant from
9 unlimited liability for all of the economic consequences of a negligent act, particularly in a
10 commercial or professional setting, and thus to keep the risk of liability reasonably
11 calculable.” *Local Joint Executive Bd. of Las Vegas, Culinary Workers Union, Local No.*
12 *226 v. Stern*, 651 P.2d 637, 638 (Nev. 1982). “The foreseeability of economic loss, even
13 when modified by other factors, is a standard that sweeps too broadly in a professional
14 or commercial context, portending liability that is socially harmful in its potential scope
15 and uncertainty.” *Id.*

16 Thus, there is a two-step process in determining whether the economic loss
17 doctrine bars a plaintiff’s claim. See *Copper Sands Homeowners Ass’n, Inc. v. Copper*
18 *Sands Realty, LLC*, 2:10-cv-00510, 2012 WL 1044311, at *4 (D. Nev. Mar. 27, 2012).
19 The first step is to determine whether Plaintiff seeks “purely economic losses.” See *id.*
20 (citing *Terracon*, 206 P.3d at 86.) If the damages are purely economic in nature, the
21 second step is to identify whether the claim is of a type that has historically been found
22 to be barred by the economic loss doctrine. See *Copper Sands*, 2012 WL 1044311 at
23 *4–5. The economic loss doctrine does not “bar the recovery of
24 purely economic losses when the defendant intentionally breaches a duty that is
25 imposed independently of the obligations arising from contract.” *Davis v. Beling*, 278
26 P.3d 501, 514 (Nev. 2012). Some examples of situations where courts have allowed
27 recovery of “purely economic losses” include “negligent misrepresentation and

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1 professional negligence actions against attorneys, accountants, real estate
2 professionals, and insurance brokers.” *Terracon*, 206 P.3d at 87 (listing cases).

3 The Nevada Supreme Court has provided guidance on what constitutes “purely
4 economic loss.” “Purely economic loss” is defined as “the loss of the benefit of the user's
5 bargain . . . including . . . pecuniary damage for inadequate value, the cost of repair and
6 replacement of the defective product, or consequent loss of profits, without any claim of
7 personal injury or damage to other property.” *Terracon*, 206 P.3d at 83 (*citing Calloway*,
8 993 P.2d at 1263 (*quoting American Law of Products Liability* (3d) § 60:36, at 66
9 (1991))). Outside of the product liability context, the Nevada Supreme Court cases
10 applying the economic loss doctrine have done so primarily in the professional services
11 context. *See, e.g., Terracon*, 206 P.3d at 83–84 (property owner claimed that
12 engineering and architectural firms provided negligent design advice relied upon in
13 making improvements to commercial property, and asserted that the resulting foundation
14 problems caused economic loss and fees); *Calloway*, 993 P.2d at 1269 (homeowners
15 claimed that construction companies negligently designed townhomes with defective
16 framing, causing homeowners to “fail to receive benefit of their bargains” and a “lower
17 quality of standard than expected”); *Stern*, 651 P.2d at 637-38 (employees of a hotel at
18 the time of a fire brought claims against construction companies alleging negligence and
19 seeking to recover lost salaries and employment benefits). These cases found that
20 plaintiffs sought to recover “purely economic loss” where they asked for monetary
21 damages to compensate for decrease in value, costly repairs and fees or lost profits. A
22 large part of the rationale for restricting these kinds of claims in tort is that, in the context
23 of commercial activity, “contract law can be invoked to enforce the quality expectations
24 derived from the parties' agreement.” *Terracon*, 206 P.3d at 87 (*citing Calloway*, 993
25 P.2d at 1265-66).

26 Plaintiff does not seek to recover “purely economic loss.” As alleged in the
27 Complaint, the Individual Defendants opened a bank account at Wells Fargo in Plaintiff's
28 name and paid others from this account, causing significant monetary loss. (Dkt. no. 1,

1 Ex. A at 3 ¶18, 7 ¶49.) As Plaintiff points out in the Opposition, they seek damages equal
 2 to the amount allegedly stolen through the fraudulent account. (Dkt. no. 11 at 13.) There
 3 is no indication that Plaintiff seeks diminution in value, costly repairs, fees or lost profits
 4 from Wells Fargo. Unlimited liability for all of the economic consequences of Wells
 5 Fargo's allegedly negligent actions is thus not an issue here because the amount taken
 6 from Plaintiff is "reasonably calculable." *Stern*, 651 P.2d at 638. Unlike defective products
 7 or negligent construction, which can continue to cause economic damages to countless
 8 businesses and individuals even after the construction or product is fixed or replaced,
 9 the harms caused by negligent actions such as those alleged in the Complaint are clear
 10 and immediate. As soon as the fraud is discovered and the account is closed, the loss of
 11 money stops and can be calculated.

12 The goal of the economic loss doctrine is to ensure that negligent parties are not
 13 faced with endless economic liability for their negligent acts. But that problem is not
 14 present in this case where Plaintiff seeks compensation for a quantifiable amount of
 15 personal property (i.e., a specific sum of money) that was actually taken from its
 16 possession. The Court is not aware of any Nevada case law to the contrary.⁴

17 In *Calloway*, the Nevada Supreme Court found that "the overriding policy of tort
 18 law, to promote safety" is not implicated in a suit brought by homeowners against

19 ⁴*Sovereign Bank v. BJ's Wholesale Club, Inc.*, 395 F. Supp. 2d 183 (M.D. Pa.
 20 2005), which Wells Fargo offers as an example of a case in which the economic loss
 21 doctrine is applied in the banking context, is not applicable to this case. In *Sovereign*,
 22 Sovereign Bank brought an action against a restaurant and the bank that processes
 23 credit cards for the restaurant where the restaurant allegedly negligently allowed their
 24 computer system to be hacked. 395 F. Supp. 2d at 187. Credit cards were stolen
 25 belonging to Sovereign Bank's customers and Sovereign Bank sued to recover the costs
 26 of replacing the stolen cards and reimbursing the cardholders. *Id.* The court allowed the
 27 negligence claim against the restaurant to proceed but held that Sovereign Bank's
 28 negligence claim against the bank was barred by the economic loss doctrine. *Id.* at 203-
 04. Claims for cost of repair and replacement are characteristic of recovery for "purely
 economic loss." See *Calloway*, 993 P.2d at 1263. The court in *Sovereign* emphasized
 that it was the "context in which [Sovereign Bank] lost its money, payment for
 replacement cards and reimbursement for unauthorized charges" that lead the court to
 conclude it suffered "purely economic loss." 395 F. Supp. 2d at 204. Cost of repair and
 replacement damages are not at issue in this case. Unlike Sovereign Bank, Plaintiff had
 a set amount of its own money taken from its possession and Plaintiff can be
 compensated and made whole.

1 construction companies alleging negligently designed townhomes with defective framing.
2 993 P.2d at 1269. However, the plaintiffs in *Calloway* had contractual remedies to
3 recover their losses. *Id.* at 1262. The court in *Calloway* noted that contract law, as
4 opposed to tort law, "is designed to enforce the expectancy interests created by
5 agreement between the parties and seeks to enforce standards of quality" and the
6 "standard of quality must be defined by reference to that which the parties have agreed
7 upon." 993 P.2d at 1265. Unlike *Calloway*, this is not a case of economic expectancies.
8 Plaintiff in this case apparently had no contractual relationship with Wells Fargo. Nor did
9 the Plaintiff willingly avail itself of any of Wells Fargo's products and services. Plaintiff
10 was never in a position to contract against this loss because the account was opened
11 without Plaintiff's knowledge. Plaintiff's common law negligence allegations are thus
12 well-suited for tort law, as opposed to contract law.

13 Examining the Complaint's allegations in the light most favorable to the Plaintiff,
14 the Court concludes that Plaintiff's common law negligence claim is not barred by the
15 economic loss doctrine.

16 3. Leave to Amend


17 Plaintiff asks the Court to grant leave to amend the Complaint in the event the
18 Court decides to dismiss any of its claims. (Dkt. no. 11 at 14.) Generally, "[d]ismissal
19 without leave to amend is improper unless it is clear, upon de novo review, that the
20 complaint could not be saved by any amendment." *Gompper v. VISX, Inc.*, 298 F.3d 893,
21 898 (9th Cir. 2002) (quotation omitted). Wells Fargo argues that amendment of Plaintiff's
22 NRS 104.3405 claim would be futile because the Complaint states that the Individual
23 Defendants were not authorized to "open bank accounts, sign checks, deposit funds, or
24 in any other manner conduct financial transactions" on Plaintiff's behalf. (Dkt. no. 1, Ex.
25 A at 4 ¶22.) The Court disagrees. By the plain language of the statute, "responsibility"
26 under NRS 104.305(c) may be sufficiently alleged even where an employee does not
27 have the authority to "open bank accounts, sign checks, deposit funds, or in any other
28 manner conduct financial transactions." As the Complaint has not yet been amended in

1 this Court, and good cause appearing, Plaintiff is permitted to file an amended complaint
2 to cure the deficiencies of its allegations.

3 **IV. CONCLUSION**

4 It is therefore ordered that Defendant Wells Fargo's Motion to Dismiss Fourth
5 Claim for Relief (dkt. no. 10) is granted in part and denied in part. Plaintiff's claim under
6 NRS 104.3405, asserted as the "Fourth Claim for Relief," is dismissed without prejudice.
7 Plaintiff's common law negligence claim, also asserted as the "Fourth Claim for Relief"
8 remains. Plaintiff may file an amended complaint within fourteen (14) days of this Order.

9 DATED THIS 13th day of January 2014.

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13 MIRANDA M. DU
14 UNITED STATES DISTRICT JUDGE
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